134-361

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1547~~. 1133

J. P. CLOUGH, PRESIDENT OF THE COUNCIL OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY, APPELLANT,

vs.

E. J. CURTIS, SECRETARY OF IDAHO TERRITORY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED APRIL 12, 1889.

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INDEX.

	Original.	Print.
Petition for writ of mandamus	1	1
Alternative writ of mandamus	7	4
Demurrer to alternative writ of mandamus	12	6
Motion to quash " " " "	14	7
Judgment	16	8
Allowance of appeal	16	8
Opinion	17	8
Bond	28	14
Assignment of errors	30	15
Citation	33	16
Proof of service of citation	34	16
Clerk's certificate	35	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 7, 1889.

to elect one S. F. Taylor president *pro tem.* of said council and to elect other officers of the council, and assumed and pretended to transact legislative business thereafter, and assumed and pretended to pass enactments which the said persons pretending to be
3 a Legislature did then and there assert and claim were acts of the Legislature of the fifteenth session of Idaho Territory.

That, as your applicant is informed and on his information — belief charges, there are some 17 of said pretended acts of the Legislature thus assumed and pretended to be passed by the said persons after the time had expired for holding said session of the Legislature.

Your applicant further alleges that in making up and preparing a record of the said 60th day of the said session of the Legislature the clerk did not show thereafter the same to this applicant, and your applicant has never seen till after the said chief clerk had filed with the secretary of the Territory, the defendant herein, certain papers which he claimed and pretended were the proceedings of the said sixtieth day of the said session of the council, but which, in truth and in fact, were a false and fictitious account of the proceedings of that day, signed by S. F. Taylor and not signed by J. B. Clough, president of the council, as required by the rules and practice of the council.

That your applicant has now seen the said pretended proceedings in the office of the secretary of the Territory, and finds that a part of the said pretended minutes or records has been cut out; that there are 3 stubs of leaves which have been a part of the former proceedings of the records or minutes of the said fifteenth session.

That that part of the minutes which recites that the said president of the council had declared the said session adjourned and his reasons therefor have [has] been cut out and was omitted from the minutes as filed with said secretary of the Territory.

4 That this applicant, the president of the said council, did, on the 14th day of February, 1889, call the attention of the said secretary of the Territory to the said cut leaves, and stated to him the proceedings which should have appeared therein, and handed to him a report of the proceedings as they actually occurred, and demanded that the same should be incorporated with the proceedings of the said Legislature and be recorded as a part of the proceedings of the council of said Legislature.

That the said Edward J. Curtis, secretary of the Territory of Idaho, did then and there decline to record the said adjournment and proceedings and each and every part thereof as part of the proceedings of the said Legislature.

And your applicant did then and there also demand that the said report as furnished by this applicant should be certified to Congress as a part and a portion of the proceedings of the Legislature of Idaho for the fifteenth session.

That the said Edward J. Curtis did then and there refuse to report the said adjournment as a part of the said proceedings or any part of the report as furnished by this applicant, and your applicant, after having stated and certified to said Edward J. Curtis, secretary

of the Territory of Idaho, that all of the alleged proceedings wherein it was pretended and claimed that said S. F. Taylor was president *pro tem.* were had after the hour of 12 o'clock and after the adjournment of the said council by the president thereof, demanded that the said subsequent pretended [illegible] etended proceed- at the fteenth of the id pre- lor, as e said ens to dings. amus the the the and the med rike acts ylor by the

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Supreme Court U. States 134 U. S 361-388

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to elect one S. F. Taylor president *pro tem.* of said council and to

part of the report as furnished by this applicant, and your applicant, after having stated and certified to said Edward J. Curtis, secretary

of the Territory of Idaho, that all of the alleged proceedings wherein it was pretended and claimed that said S. F. Taylor was president *pro tem.* were had after the hour of 12 o'clock and after the adjournment of the said council by the president thereof, demanded that the said subsequent pretended proceedings and pretended
5 legislation should not be recorded as a part of the proceedings of the Legislature, and, if already recorded, that the same be expunged from the record of the proceedings of the fifteenth session of the said Legislature, all of which the said secretary of the Territory declined to do and still does decline to treat the said pretended proceedings and acts signed by the said S. F. Taylor, as president *pro tem.*, as null and void, and threatens to report the said proceedings of the council of the said Legislature and threatens to certify the same to Congress as a part of the said proceedings.

6 Wherefore your applicant prays that a writ of mandamus may issue from this honorable court commanding the said Edward J. Curtis, secretary of Idaho Territory, to record the said report of your petitioner as a part of the proceedings of the said fifteenth session of the council of the Territory of Idaho, and commanding him to expunge from the record and minutes of the sixtieth day of said session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to strike from the files and record of the laws of Idaho those pretended acts of the Legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council and signed by him as such, and for such other relief as may be proper under the circumstances.

(Signed) ARTHUR BROWN,
LYTTLETON PRICE,
S. B. KINGSBURY,
TEXAS ANGEL,
Attorneys for said J. P. Clough, President of the Council.

TERRITORY OF IDAHO, } ss:
County of Ada, }

John P. Clough, being sworn, says that he has read the foregoing application for a writ of mandate and knows the contents thereof; that the same is true of his own knowledge, except as to matters stated to be on information and belief, and as to those matters he believes it to be true; that he makes the annexed application a part of this affidavit.

J. P. CLOUGH.

Subscribed and sworn to before me this 15th day of February, A. D. 1889.

S. H. HAYS, *Clerk.*

[Endorsed:] In the supreme court of Idaho. In the matter of the application of J. P. Clough, pres. of council, *vs.* E. J. Curtis, secretary, for mandamus. Application. Filed Feb. 16th, 1889. S. H. Hays, clerk.

7 In the Supreme Court of Idaho Territory.

In the Matter of the Application of J. P. CLOUGH, president of the council of the fifteenth session of the Legislature of Idaho, for a writ of mandate against Edward J. Curtis, secretary of the Territory of Idaho.

Alternative Writ of Mandate.

It appearing from the sworn application of J. P. Clough in the above-entitled matter that the said J. P. Clough was duly elected, qualified, and acting as and is the acting president of that body;

That the defendant, Edward J. Curtis, is the secretary of the Territory of Idaho, and that on the 60th day of the session of the said Legislature the following proceedings were had in the council:

That the said council continued in session during the whole of said 60th day till 12 o'clock midnight of that day and thereafter till about one o'clock of the next succeeding morning;

That at that time a communication, received from the chief clerk of the house of representatives of said fifteenth session of the said Legislature, announced that the said house of representatives had then and there elected one George P. Wheeler as speaker *pro tem.* of the said house of representatives;

That this communication was received long after the sixtieth day had expired, to wit, about one o'clock of the eighth day of February, 1889;

8 That the president of the council, then presiding as such, then and there declined to receive said message as a message from the house for the reason that the said house had no authority to elect a speaker after the sixtieth day, prescribed by the act of Congress, had expired;

That thereupon the president of said council, as such president, did then and there announce to said council that because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said Legislature was permitted to transact business, that therefore the said council was adjourned without day;

And it further appearing that the said fifteenth session of the council of the Legislature of Idaho was then and there adjourned and terminated—

That the president then inquired of the chief clerk, Edward L. Curtis, if said adjournment was recorded in the minutes of said session, and received a reply from him that it was;

That the said council then dispersed, and that the president and other members of the council left the room, and that thereafter other members of the council assumed and pretended to reorganize the said council, and assumed and pretended to elect S. F. Taylor president *pro tem.* of said council, and to elect other officers of the council, and assumed and pretended to transact business thereafter, and assumed and pretended to pass enactments which the said persons pretending to be a Legislature did then and there assert and claim were acts of the Legislature of the fifteenth session, and

that there were some 17 of said pretended acts of legislation
9 thus assumed and pretended to be passed by the said persons after the time had passed for the session of the said Legislature;

That in preparing and making up the record of the said sixtieth day of the said Legislature the clerk did not thereafter show the same to the president of the council, and that the president of the council was not permitted by the chief clerk, Edward L. Curtis, to see the minutes, and that he has never seen them till after the chief clerk had filed them with the secretary of the Territory, the defendant herein, certain papers which the clerk claimed and pretended were the proceedings of the said sixtieth day of the said session of the council, and which, in fact, were a false and fictitious account of the proceedings of that day, signed by S. F. Taylor and not signed by J. P. Clough, president of the council, as required by the rules and practice of the council;

It appearing in the same manner from the said pretended minutes or records he filed in the office of the secretary of the Territory that a part has been cut out, and that there are 3 stubs of leaves which have been a part of the former preceedings of the record or minutes of the said session of the fifteenth Legislature—

That that part of the minutes which recites that the president of the council had declared the said session adjourned and his reasons therefor have been cut out and omitted from the minutes as filed with the said secretary of the Territory;

That the president of the said council did, on the 14 day of February, 1889, call the attention of the said secretary of the Territory of Idaho to the said cut leaves, and stated to him the proceedings which should have appeared therein, and handed to him a report of the proceedings as they actually occurred, and demanded
10 that the same should be incorporated with the preceedings of the said Legislature, and be recorded as a part of the proceedings of the council of said Legislature;

That the said Edward J. Curtis, secretary of the Territory of Idaho, did then and there decline to record the said adjournment and proceedings and each and every part thereof as part of the proceedings of the Legislature;

That the said president of the council did then and there also demand that the said report as furnished by him should be certified to Congress as a part of the fifteenth session of the Legislature of Idaho Territory;

That the said Edward J. Curtis did then and there refuse to report the said adjournment as part of the said proceedings or any part of the proceedings as furnished by the president of the council, and, after stating to said defendant secretary that all of the proceedings wherein it was pretended that S. F. Taylor was president *pro tem.* was after the hour of 12 o'clock and after the adjournment of the council by the president thereof, said president demanded of the secretary that the subsequent pretended proceedings and pretended legislation should not be recorded as part of the proceedings of the Legislature, and, if already recorded, that the same be expunged

from the records of the proceedings of the said fifteenth session of the Legislature, all of which the said secretary of the Territory refused to do and still declines to treat all said pretended proceedings and acts signed by S. F. Taylor as president *pro tem.* as null and void, and threatens to report the said proceedings of the council of the said Legislature and threatens to certify the same to Congress as part of the said proceedings:

11 Now, therefore, you, the said Edward J. Curtis, secretary of the Territory of Idaho, are hereby commanded to record the said report of the said proceedings of the said council as a part of the proceedings of the fifteenth session of the Legislature of Idaho Territory, and are commanded to expunge from the records of the said sixtieth day of the session all the proceedings assumed to have been done while S. F. Taylor is alleged to be president of the council, and to strike from the files & records of the laws of Idaho those pretended acts of legislation signed by S. F. Taylor as president of the council, or show cause on the 18th day of February, at 10 o'clock a. m. of said day, A. D. 1889, before the supreme court why you should not do so.

By the court:

H. W. WEIR,
Chief Justice.

Attest:

[L. S.] S. H. HAYS, *Clerk.*

[Endorsed:] In the supreme court of Idaho. In the matter of the application of J. P. Clough *v.* E. J. Curtis, secretary. Alternative writ of mandate. Filed Feb. 16th, 1889. S. H. Hays, clerk.

12 In the Supreme Court of Idaho Territory.

In the Matter of the Application of J. P. CLOUGH, president of the council of the fifteenth session of the Legislature of Idaho, for a writ of mandate, pl'ff, *vs.* Edward J. Curtis, secretary of the Territory of Idaho, def't.

Now comes the said defendant, Edward J. Curtis, and demurs to the alternative writ of mandate herein upon the following grounds, which appear upon the face thereof:

1st. That the court has no jurisdiction of the person of the defendant or the subject of this proceeding.

2nd. That the plaintiff has no legal capacity to sue, in this, that the said writ does not show that he has any beneficial interest therein; that if he be the officer alleged in said writ at the time of the commencement of this action this proceeding should have been brought upon the relation of the proper prosecuting officer.

3d. That it does not state facts sufficient to constitute a cause of action or proceeding of this kind.

4th. That the same is ambiguous and uncertain, in this, that the same does not clearly state what act or acts the defendant is re-

quired to perform, what matters are sought to be inserted in said journals and minutes and what to be stricken out.

J. H. HAWLEY,
U. S. District Attorney, and
13 JOHN S. GRAY,
Attorneys for Edward J. Curtis, Defendant.

Endorsed as follows: In the supreme court of Idaho. In the matter of the application of J. P. Clough, president of council, *vs.* E. J. Curtis, secretary. Demurrer to writ. Filed Feb. 18th, 1889. S. H. Hays, clerk. Jas. H. Hawley, U. S. dist. att'y, and John S. Gray, att'ys for defendant.

14 In the Supreme Court of Idaho Territory.

In the Matter of the Application of J. P. CLOUGH, president of the council of the fifteenth session of the Legislature of Idaho, for a writ of mandate, pl'ff, against Edward J. Curtis, secretary of the Territory of Idaho, def't.

Now comes the said defendant, Edward J. Curtis, and moves to quash the alternative writ of mandate herein upon the following grounds, which appear upon the face thereof:

1. That the court has no jurisdiction of the person of the defendant or the subject of this proceeding.

2. That the plaintiff has no legal capacity to sue, in this, that the said writ does not show that he has any beneficial interest therein; that if he be the officer alleged in said writ at the time of the commencement of this action the proceedings should have been brought upon the relation of the proper presiding officer.

15 3. That it does not state facts sufficient to constitute a cause of action or proceeding of this kind.

4. That the same is ambiguous and uncertain, in this, that the same does not clearly state what act or acts the defendant is required to perform, what matters to be inserted in said journals and minutes and what to be stricken out.

J. H. HAWLEY,
U. S. Dist. Attorney, and
JOHN S. GRAY,
Attorneys for Edward J. Curtis, Defendant.

[Endorsed:] In the supreme court of Idaho. In the matter of the application of J. P. Clough, pres. of the council, against E. J. Curtis, secretary, for mandamus. Motion to quash writ. Filed Feb. 18th, 1889. S. H. Hays, clerk. Jas. H. Hawley, U. S. dist. att'y, & John S. Gray, att'ys for defendant.

16 MONDAY, *March 11th*, 1889.

Supreme Court, Idaho Territory.

J. P. CLOUGH, President of the Council of Idaho Territory, Pl'ff,
vs.
EDWARD J. CURTIS, Secretary of Idaho Territory, Def't.
} Application for Writ of Mandate.

Now, on this day, this cause having been heretofore submitted and taken under advisement by the court and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Weir, to the effect that the demurrer heretofore interposed to the complaint herein be sustained, Justice Berry dissenting.

Whereupon it is now considered, ordered, adjudged, and decreed by the court that said demurrer be, and the same is hereby, sustained. And now comes Arthur Brown, Esq., attorney for plaintiff, and moves the court to allow an appeal herein to the Supreme Court of the United States, which appeal is hereby duly allowed; and it is further ordered that the penalty of the bond on such appeal be fixed at $500.00.

17 In the Supreme Court of the Territory of Idaho. January Term, A. D. 1889.

In the Matter of the Application of J. P. CLOUGH, president of the council of the fifteenth session of the Legislature of Idaho, for a writ of mandate against Edward J. Curtis, secretary of the Territory of Idaho.

WEIR, *C. J.*:

This is an application by the plaintiff for a writ of mandate to be directed to the defendant above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which reads as follows:

"Your applicant respectfully shows to your honorable court that he is the president of the council of the fifteenth session of the Legislature of Idaho Territory.

"That he was duly elected, qualified, and acted as and is the acting president of that body; that the defendant, Edward J. Curtis, is the secretary of the Territory of Idaho.

"That on the 60th day of the said session of the Legislature, Feb'y 7th, 1889, the following proceedings were had in the council:

"That the said council continued in session during the whole of the said sixtieth day till 12 o'clock midnight of that day and thereafter till about one o'clock of the next succeeding morning.

18 "That at that time a communication was received by the said council from the chief clerk of the house of representa-

tives of the said fifteenth session, announcing that the said house of representatives had then and there elected one George P. Wheeler as speaker *pro tem.* of the said house of representatives.

"That this communication was received long after the sixtieth day had expired, to wit, about one o'clock of the 8th day of February, 1889.

"That your applicant, the president of the council, then and there declined to receive the said message as a message from the house, for the reason that the said house of representatives had no authority to elect a speaker after the 60 days prescribed by the limitation of the act of Congress had expired.

"That thereupon this applicant, as president of said counsel, did then and there announce to the council and declare 'that because the hour of 12 o'clock and after had arrived and the time had elapsed in which said Legislature was permitted to transact business, therefore the said council was adjourned without day,' and your applicant alleges that the said fifteenth session of the council of the Legislature of Idaho Territory was then and there adjourned and terminated.

"That your applicant then inquired of the chief clerk, Edward L. Curtis, if the said adjournment was recorded in the minutes of the proceedings of the said session, and received the reply from him that it was.

"Your applicant further shows that the said council then dispersed, and he himself and other members of the council left the room, and your applicant is informed and alleges, on infor-
19 mation and belief, that after the said president of the council and other members of the council had left the room other members assumed and pretended to reorganize the said council and assumed and pretended to elect one S. F. Taylor president *pro tem.* of said council, and to elect other officers of the council, and assumed and pretended to transact legislative business thereafter, and assumed and pretended to pass enactments which the said persons pretending to be a legislature did then and there assert and claim were acts of the Legislature of the fifteenth session of Idaho Territory.

"That, as your applicant is informed and on his information and belief charges, there are some 17 of said pretended acts of the Legislature thus assumed and pretended to be passed by the said persons after the time had expired for holding said session of the Legislature.

"Your applicant further alleges that in making up and preparing a record of the said 60th day of the said session of the Legislature the clerk did not show thereafter the same to this applicant, and your applicant has never seen, till after the said chief clerk had filed with the secretary of the Territory, the defendant herein, certain papers which he claimed and pretended were the proceedings of the said sixtieth day of the said session of the council, but which in truth and in fact were a false and fictitious account of the proceedings of that day, signed by S. F. Taylor and not signed by J. P. Clough, president of the council, as required by the rules and

practice of the council; that your applicant has now seen the said pretended proceedings in the office of the secretary of the
20 Territory and finds that a part of said pretended minutes or records has been cut out; that there are 3 stubs of leaves which have been a part of the former proceedings of the records or minutes of said fifteenth session.

"That that part of the minutes which recites that the said president of the council had declared the said session adjourned and his reasons therefor have been cut out and was omitted from the minutes as filed with said secretary of the Territory.

"That this applicant, the president of the said council, did, on the 14th day of February, 1889, call the attention of the said secretary of the Territory to the said cut leaves and stated to him the proceedings which should have appeared therein, and handed to him a report of the proceedings as they actually occurred, and demanded that the same should be incorporated with the proceedings of the said Legislature and be recorded as a part of the proceedings of the council of said Legislature.

"That the said Edward J. Curtis, secretary of the Territory of Idaho, did then and there decline to record the said adjournment and proceedings and each and every part thereof as a part of the proceedings of the said Legislature.

"And your applicant did then and there also demand that the said report as furnished by this applicant should be certified to Congress as a part and a portion of the proceedings of the Legislature of Idaho for the fifteenth session.

"That the said Edward J. Curtis did then and there refuse to report the said adjournment as a part of the said proceedings or any part of the report as furnished by this applicant, and your applicant, after having stated and certified to the said Edward J. Curtis, secretary of the Territory of Idaho, that all of the alleged pro-
21 ceedings wherein it was pretended and claimed that said S. F. Taylor was president *pro tem.* were had after the hour of 12 o'clock and after the adjournment of the said council, by the president thereof demanded.

"That the said subsequent pretended proceedings and pretended legislation should not be recorded as a part of the proceedings of the Legislature, and, if already recorded, that the same be expunged from the record of the proceedings of the fifteenth session of the said Legislature, all of which the said secretary of the Territory declined to do and still declines to treat the said pretended proceedings and acts signed by the said S. F. Taylor as president *pro tem.* as null and void, and threatens to report the said proceedings of the council of the said Legislature and threatens to certify the same to Congress as a part of the said proceedings.

"Wherefore your applicant prays that a writ of mandamus may issue from this honorable court commanding the said Edward J. Curtis, secretary of Idaho Territory, to record the said report of your petitioner as a part of the proceedings of the said fifteenth session of the council of the Territory of Idaho, and commanding him to expunge from the records and the minutes of the sixtieth day of said

session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to strike from the files and record of the laws of Idaho those pretended acts of the Legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council and signed by him as such, and for such other relief as may be proper under the circumstances."

Upon this petition the court granted an alternative writ of
22 mandate, returnable on the 14th day of February, 1889; to which the defendant demurred and assigned for cause the following grounds:

"1st. That the court has no jurisdiction of the person of the defendant or the subject of this proceeding.

"2nd. That the plaintiff has no legal capacity to sue, in this, that the said writ does not show that he has any beneficial interest therein; that if he be the officer alleged in said writ at the time of the commencement of this action the proceedings should have been brought upon the relation of the proper prosecuting officer.

"3rd. That it does not state facts sufficient to constitute a cause of action or proceeding of this kind.

"4th. That the same is ambiguous and uncertain, in this, that the same does not clearly state what act or acts the defendant is required to perform—what matters are sought to be inserted in said journals and minutes and what to be stricken out."

This proceeding is based on sections 3815 and 3816 of the Revised Statutes of this Territory. Sec. 3815 declares that the jurisdiction of this court is of two kinds—original and appellate. Sec. 3816 provides that "its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction."

We do not deem it necessary no notice the various grounds set out in this demurrer, but will confine our attention to the third cause assigned, which is as follows: "That it does not state facts sufficient to constitute a cause of action or proceeding of this kind." The decision of the court upon this ground disposes of the case, according to our view, and renders unnecessary a discussion
23 of the other grounds.

The consideration and decision of the question raised by this ground of demurrer necessarily involves an inquiry into the powers and duties of the defendant conferred on him by law. Sec. 124 of the Revised Statutes of Idaho prescribes the duties of the chief clerk of the legislative council and the duties of the defendant, as secretary of the Territory, in reference to the journals and rolls of that body, in these words: "The clerks, at the close of each session of the Legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses, to the secretary of the Territory, who must certify to the reception of the same."

Sec. 1844 of the organic act imposes further duties upon the secretary of the Territory, and prescribes and defines those duties as follows: "The secretary shall record and preserve all laws and pro-

ceedings of the Legislative Assembly, and all the acts and proceedings of the Governor in the executive department. He shall transmit one copy of the laws and journals of the Legislative Assembly, within thirty days after the end of each session thereof, to the President of the Senate and to the Speaker of the House of Representatives for the use of Congress. He shall transmit one copy of the executive proceedings and official correspondence semi-annually, on the first day of January and July in each year, to the President. He shall prepare the acts passed by the Legislative Assembly for publication, and furnish a copy thereof to the public printer of the Territory within ten days after the passage of each act."

And afterwards, by act of Congress of June 20th, 1874, further duties were imposed upon him, which are as follows: "And hereafter it shall be the duty of the secretary of each Territory to furnish estimates in detail for the lawful expenses thereof, to be presented to the Secretary of the Treasury on or before the first day of October of every year."

The duties of the defendant are very clearly defined by these statutes. They constitute the chart of his authority. He is bound to perform the duties thus imposed upon him, but nothing more. He must receive from the clerks of both branches of the Legislature, at the close of each session, all bills and papers belonging to the archives of the respective houses, together with all the books of both houses, and must also certify to the reception of the same. He is not required nor, in fact, permitted to receive and record any such documents from any other source. Clearly, it was not his duty to receive from the plaintiff his alleged report of the proceedings as he claimed them to be, or to incorporate the same in the proceedings of the said Legislature, or to record the same as a part of the proceedings, or to certify the same to Congress. It is equally clear that it was not the duty of the secretary, upon the plaintiff's demand, to expunge from the journal and minutes of the sixtieth day of the said session the proceedings assumed to be had before S. F. Taylor, as president of the council, or to strike from the files and records the alleged pretended acts of the Legislature which were passed while the said S. F. Taylor was acting as president *pro tem.* of the council. Not only was he not authorized to do what was demanded of him, but, if he had done so, it would have been a clear breach of his official duty. The law authorized him to receive such reports from one source only, and he could not lawfully receive them from any other. The president of the council had no more right to make this demand upon the secretary than would any other member of the Legislature, and certainly, upon the unsupported word of one member of the Legislature only, the secretary would not be authorized to change, modify, or expunge from the journal, which he had received from the proper source, anything therein contained. Neither had he the right to assume judicial functions and decide upon evidence what should constitute the proceedings of the Legislature.

It is not within the scope of mandamus to confer power upon

those to whom it is directed. It only enforces the exercise of powers already existing, when exercise is a duty.

United States *v.* County of Clark, 95 United States, 769.

The court there say: "A mandamus does not confer power upon those to whom it is directed. It only enforces the exercise of power already existing, when its exercise is a duty."

In the case of the Supervisors *v.* United States, 18 Wallace, 77, Mr. Justice Strong, in delivering the opinion of the Court, says: "It is very plain that a mandamus will not be awarded to compel county officers of a State to do any act which they are not authorized to do by the laws of the State from which they derive their powers. Such officers are the creatures of the statute law, brought into existence for public purposes and having no authority beyond that conferred upon them by the author of their being; and it may be observed that the office of a writ of mandamus is not to create duties, but to compel the discharge of those already existing.
26 A relator must always have a clear right to the performance of a duty resting on the defendant before the writ can be invoked."

And again, in the case of the United States *v.* County of Macon, 99 United States, 591, the Court say: "We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation."

We might cite a multitude of authorities which sustain this doctrine, but the principle is so well established that we deem it unnecessary.

Certainly, considering this as well-established law, we cannot create in the secretary of the Territory a power to determine from evidence what are the correct minutes of the Legislature. No such power is conferred upon him by statute; nor is there any such duty imposed upon him. As we have already stated, he is required to receive such journals as are handed to him by the clerks, and, after receiving them, to perform certain duties in regard thereto such as we have stated. There his power and his duty end.

To dispose of this case it is only necessary for us to refer to the prayer of the petition: "Wherefore your applicant prays that a writ of mandamus may issue from this honorable court commanding the said Edward J. Curtis, secretary of Idaho Territory, to record the said report of your petitioner as a part of the proceedings of the said fifteenth session of the council of the Territory of Idaho, and commanding him to expunge from the records and minutes of the sixtieth day of said session all the pretended proceedings assumed to be done by S. F. Taylor as president of the council, and to
27 strike from the files and record of laws of Idaho those pretended acts of the Legislature which were passed while the said S. F. Taylor pretended to be president *pro tem.* of the council and signed by him as such, and for such other relief as may be proper under the circumstances."

For the reasons stated, and also for those given in the case of Burkhart, speaker, etc., *v.* Reed, chief clerk, etc., and Curtis, secre-

tary of the Territory, decided at this term of court, the demurrer is sustained and the application for a writ of peremptory mandamus is denied, with costs.

(Signed) WEIR, *C. J.*

I concur.

LOGAN, *J.*

28 In the Supreme Court of Idaho Territory.

J. P. CLOUGH, President of the Council of the Fifteenth Session of the Legislature of Idaho,

vs.

E. J. CURTIS, Secretary of Idaho Territory.

Know all men by these presents that we, J. P. Clough, as principal, and Henry R. Plughoff and Ronello W. Berry, as sureties, are held and firmly bound and jointly indebted to E. J. Curtis in the sum of five hundred (500) dollars, lawful money of the United States; for the payment of which, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March, A. D. 1889.

Whereas lately, at the January term of the supreme court for the Territory of Idaho, in a cause pending in said court between J. P. Clough and E. J. Curtis, wherein said Clough was seeking a writ of mandamus and said Curtis, secretary of Idaho Territory, was defendant, judgment was rendered against said Clough, denying the writ of mandamus and sustaining the demurrer of said Curtis to the complaint of said Clough, and the said Clough having since, to wit, on the eleventh day of March, A. D. 1889, obtained the allowance of an appeal from said judgment sustaining said demurrer to the Supreme Court of the United States, and a citation, directed to the said E. J. Curtis, secretary of Idaho Territory, citing and admonishing him to be and appear at said Supreme Court of the States, at a session to be holden at Washington, D. C., on

——:

29 Now, the condition of the above obligation is such that if the said Curtis shall prosecute the said appeal to effect and answer all damages and costs in case he fails to make his appeal good, then this obligation to be void; otherwise to remain in full force and effect.

J. P. CLOUGH. [SEAL.]
H. R. PLUGHOFF. [SEAL.]
R. W. BERRY. [SEAL.]

TERRITORY OF IDAHO, *County of Alturas:*

Henry R. Plughoff and Ronello W. Berry, being duly sworn, each for himself says: I am a freeholder and resident in the Ter-

ritory of Idaho and am worth the sum of five hundred (500) dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

H. R. PLUGHOFF.
R. W. BERRY.

Subscribed and sworn to before me this 18th day of March, A. D 1889.

S. H. HAYS, *Clerk*,
By E. A. WEIR, *Deputy*.

The foregoing bond approved by me this 19th day of March, A. D. 1889.

H. W. WEIR,
Chief Justice Idaho Ter.

[Endorsed:] Supreme court Idaho Ter. J. P. Clough, pres. of council, pl'ff, *vs.* E. J. Curtis, sec. of Idaho, def't. Bond. Filed March 19th, 1889. S. H. Hays, clerk.

30 In the Supreme Court, Idaho Territory.

J. P. CLOUGH, President of the Council of the 15th Session of the Legislature of Idaho Territory, Plaintiff,
vs.
E. J. CURTIS, Secretary of the Territory of Idaho.
} Assignment of Errors.

Now comes the above said plaintiff and appellant, by Arthur Brown, his attorney, and assigns errors in the decision of the said court denying the application for writ of mandamus in the above-entitled cause, as follows:

I.

The court erred in sustaining the demurrer to the alternative writ of mandamus.

II.

The court erred in holding that it had no jurisdiction or authority to compel the defendant to amend the pretended paper assumed to be the journal of the council of the Legislature.

III.

The court erred in holding that it had no power to compel the defendant to record the adjournment of the Legislature as it actually took place, after twelve o'clock of the 60th day of the session.

IV.

31 The court erred in holding that the alternative writ did not state facts sufficient to entitle the plaintiff to the peremptory writ of mandamus.

V.

The court erred in holding that it had no power to order the defendant to expunge from the records the pretended acts of legislation passed by persons who wrongfully pretended to be a Legislature, after the council had itself adjourned, at the close of the 60th day of its session.

VI.

The court erred in not granting the peremptory writ of mandamus as prayed in the alternative writ.

Wherefore the said plaintiff prays that the said judgment in the supreme court of the Territory of Idaho may be reversed and the said defendants required to answer to the said alternative writ of mandamus, and for such other relief as may be proper under the circumstances.

ARTHUR BROWN,
Att'y for Plaintiff & Appellant.

32 [Endorsed:] In the supreme court, Idaho Territory. J. P. Clough, president of the council, etc., pl'ff, *vs.* E. J. Curtis, secretary of the Territory, etc., def't. Assignment of errors. Filed March 19th, 1889. S. H. Hays, clerk.

33 In the Supreme Court of Idaho Territory.

J. P. CLOUGH, President of the Council of the 15th Session of the Legislature of Idaho Territory, Plaintiff,
vs.
E. J. CURTIS, Secretary of Idaho Territory, Defendant. } Citation.

The United States of America to E. J. Curtis, secretary of Idaho Territory, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to and to answer an appeal in a suit in which said J. P. Clough is appellant and you are appellee, to show cause, if any there be, why a judgment of the supreme court of Idaho Territory, rendered against said appellant in said appeal should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hugh W. Weir, chief justice of the supreme court of Idaho Territory, this 18th day of March, 1889.

H. W. WEIR,
Chief Justice.

34 Service of the foregoing citation admitted this 19th day of March, 1889.

JAMES H. HAWLEY,
U. S. Att'y, and
JOHN S. GRAY,
Att'ys for Def't.

TERRITORY OF IDAHO, } ss:
Ada County, }

On this — day of —— personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——, attorney for the said E. J. Curtis, secretary of the Territory of Idaho.

—— ——.

Subscribed and sworn to before me the day and year above written.

—— ——.

[Endorsed:] In the supreme court, Idaho Territory. J. P. Clough, pres., etc., *vs.* E. J. Curtis, sec'y, etc. Citation.

35 TERRITORY OF IDAHO, } ss:
County of Ada, }

I, S. H. Hays, clerk of the supreme court of Idaho Territory, in pursuance of appeal allowed in the case of J. P. Clough, president of the council of the 15th session of the Legislature of Idaho Territory, *vs.* E. J. Curtis, secretary of Idaho Territory, lately pending in said court, do return attached hereto a transcript of the record of proceedings, opinions, and bond, together with the original citation and proof of service thereon, assignments of error, all in and of said court and cause, to the Supreme Court of the United States, and I hereby certify that said attached transcript of said record, proceedings, opinions, and bond is a true, full, correct, and complete copy of the several originals thereof, and on file of record in my office.

In witness whereof I hereunto set my hand and affix the seal of the supreme court of the Territory of Idaho this 30th day of March, 1889.

[Supreme Court Seal, Idaho Territory.]

S. H. HAYS,
Clerk Supreme Court, Idaho Ter.

[Endorsed:] Supreme court. J. P. Clough, president of the council, &c., plaintiff, against Edward J. Curtis, secretary of Idaho, defendant. Filed —— —, 18—. ——, clerk. ——, deputy clerk.

Endorsed on cover: Idaho Territory supreme court. No. 1547. J. P. Clough, president of the council of the 15th session of the Legislature of Idaho Territory, appellant, *vs.* E. J. Curtis, secretary of Idaho Territory. Filed April 12, 1889.